

9 FAM 41.59

NOTES

(CT:VISA-2168; 08-27-2014)
(Office of Origin: CA/VO/L/R)

9 FAM 41.59 N1 BACKGROUND

(CT:VISA-2168; 08-27-2014)

- a. On December 17, 1992, the Presidents of the United States and Mexico and the Prime Minister of Canada entered into the North American Free Trade Agreement (NAFTA). Implementation of this agreement has been provided for by the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), Public Law 103-182. The NAFTA Implementation Act was signed into law by the President of the United States on December 8, 1993. The NAFTA Implementation Act entered into force on January 1, 1994. To comply with this Agreement, INA 214(e) was added in order to provide for the admission to the United States of Mexican and Canadian citizen who are coming to engage in professional activities.
- b. Chapter 16 of NAFTA, entitled "temporary entry for business persons" was designed to facilitate the movement of business persons among the United States, Canada, and Mexico. This chapter contains the visa-related provisions relating to the temporary entry of business persons. NAFTA allows investment, trade, and professional commerce services to take place, and thus affects four nonimmigrant visa (NIV) categories in the U.S. Immigration and Nationality Act: Temporary Visitors for business (B-1); Treaty Trader and Investors (E); Intra-company transferees (L), and NAFTA professionals (TN).
- c. The U.S.-Canada Free Trade Agreement (US-CFTA) created a class of professional nonimmigrants (TC) but did not provide authority for visa issuance. NAFTA has modified and adopted the TC professional category and treats this new admission category (TN) as if it were a nonimmigrant visa (NIV) classification under INA 101(a)(15), thus authorizing the issuance of visas to both Mexicans and Canadians *(TD visas are issued to spouse and minor children of TN principals)*. The CFTA was suspended when NAFTA entered into force. The TN category should not be confused with the H-1B visa classification. It is a separate and distinct category. Similarities do exist, however, since this category was derived from the H-1B classification.

9 FAM 41.59 N2 COUNTRIES THAT BENEFIT FROM NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

(CT:VISA-1346; 10-14-2009)

Only citizens of the North American Free Trade Agreement (NAFTA) parties (Canada, Mexico, and the United States) may benefit from the agreement. Permanent resident status in any NAFTA party country does not in itself confer any benefits under this chapter of the agreement.

9 FAM 41.59 N3 NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) PROFESSIONAL REQUIREMENTS

9 FAM 41.59 N3.1 *Member of a Profession*

(CT:VISA-2168; 08-27-2014)

- a. This category extends visa classification only to NAFTA citizens who are members of a profession listed in Appendix 1603.d.1 of NAFTA, chapter 16.
- b. The alien must meet the specific requirements, education, and/or experience, etc. listed in the annex related to that particular profession. While the list originally included professional activities included under the former H-1 standards as professions, it has been extended to include additional professions. However, with rare exception each profession requires a baccalaureate degree as an entry-level requirement. If a baccalaureate is indeed required, experience cannot be substituted for that degree. In some professions, alternative criteria to a bachelor's degree are listed, and sometimes experience and criteria are required in addition to the degree. The list is occasionally expanded upon agreement of all NAFTA parties.
- c. You should always review Appendix 1603.d1 of NAFTA, Chapter 16 to make sure that the alien's job title is listed and that the alien possesses the educational level that is commensurate with that job title. It is important to note that the alien's actual job title must be determined by the consular officer based on the duties inherent in the job position description itself.

9 FAM 41.59 N3.2 *Employment Not Self-Employment*

(CT:VISA-2168; 08-27-2014)

The alien must engage in prearranged business activity for a U.S. or foreign employer. But self-employment is not an option under the category. If the alien

seeks self-employment, the alien should pursue that business under the Treaty Trader or Investor Visa classification, or another visa category. Evidence of engagement by a U.S. employer(s) or entity(ies) to engage in prearranged business activities at a professional level is necessary to accord TN classification.

9 FAM 41.59 N4 ENTRY DOCUMENTATION

9 FAM 41.59 N4.1 Canadian Citizens

(CT:VISA-2168; 08-27-2014)

Since Canadian citizens, unlike Mexican citizens, are not obliged to be in possession of a nonimmigrant visa (NIV) to enter the United States (except in the E and K categories), the issuance of a TN or TD visa should be rare. *You must* remember, however, that although Canadians don't need visas, they may, and should, be issued to qualified applicants upon request.

9 FAM 41.59 N4.2 Mexican Citizens

(CT:VISA-2168; 08-27-2014)

A Mexican citizen seeking TN status must apply for and be issued a visa. The validity of the visa *must* coincide with the reciprocity schedule. The Mexican applicant seeking visa issuance must present the requisite evidence to *you* for adjudication.

9 FAM 41.59 N4.3 Required Documentation

(CT:VISA-2168; 08-27-2014)

Both nationalities will have to submit the following documentation:

- (1) Proof of citizenship (see note 6);
- (2) Evidence of an offer of employment by submission of an employment letter. The employment letter must describe in detail the duties that are to be performed in order to show that the alien will be employed in one of the professional occupations listed in Appendix 1603.d.1 of NAFTA chapter 16 (see note 7); and
- (3) Evidence that the applicant meets the minimum education and/or work experience requirements set forth in Appendix 1603.d.1 of NAFTA (see note 7.1). The educational requirements listed should correlate with the job title as determined by *you*.

9 FAM 41.59 N5 TEMPORARY ENTRY

(CT:VISA-2168; 08-27-2014)

The agreement encompasses only business persons coming to the United States temporarily. INA 214(b), therefore, is fully applicable to TN visa applicants. Chapter 16 provides the following definition: "Temporary entry means an entry into the United States without the intent to establish permanent residence." The department's regulation (22 CFR 41.59(c)) amplifies this definition to provide additional guidance. The essence of the requirement is that the alien is seeking "temporary" entry into the United States. *You must be satisfied* that the *alien's* proposed stay is temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence. The circumstances surrounding an application should reasonably and convincingly indicate that the alien's temporary work assignment in the United States will end predictably and that the alien will depart upon completion of the assignment. An intent to immigrate in the future which is in no way connected to the proposed immediate trip need not in itself result in a finding that the immediate trip is not temporary. An extended stay, even in terms of years, may be temporary, as long as there is no immediate intent to immigrate.

9 FAM 41.59 N6 EVIDENCE OF CITIZENSHIP

(CT:VISA-1346; 10-14-2009)

The NAFTA applicant must present the requisite evidence of citizenship:

- (1) Mexican citizens must present a passport, as they require visa issuance.
- (2) Canadian citizens may present a passport, as visas are not required, or they may provide secondary evidence, such as a birth certificate. However, even Canadian citizens are required to present a valid passport at the port-of-entry (POE).

9 FAM 41.59 N7 EVIDENCE OF PROFESSIONAL EMPLOYMENT

(CT:VISA-2168; 08-27-2014)

The applicant must present evidence sufficient to satisfy the immigration or consular officer of intent to engage in prearranged business activities for a U.S. employer(s) or entity(ies) at a professional level. This evidence may be in the form of an employment letter from a U.S. or foreign employer, or contract providing a detailed description of the business activities which the individual will be engaged in, and *must* state the following:

- (1) A detailed listing of the activities in which the alien will be engaged;
- (2) Purpose of entry;

- (3) Anticipated length of stay;
- (4) Educational qualifications or appropriate credentials demonstrating professional status;
- (5) Evidence of compliance with Department of Homeland Security (DHS) regulations and/or state laws; and
- (6) Arrangements for remuneration.

9 FAM 41.59 N7.1 Education and/or Experience Requirement

(CT:VISA-2168; 08-27-2014)

- a. Education: The applicant's employer must submit evidence that the applicant meets the minimum education requirements or has the alternative credentials set forth in Appendix 1603.d.1 of chapter 16 of the NAFTA agreement. Evidence of professional qualifications may be in the form of degrees, certificates, diplomas, professional licenses, or membership in a professional organization. Degrees, diplomas, or certificates received from an educational institution outside the United States, Canada, or Mexico must be accompanied by an evaluation by a reliable credentials evaluation service specializing in evaluating foreign documentation.
- b. Experience: Evidence attesting to the applicant's experience should be in the form of letters from former employers. If the applicant was self-employed, business records *must* be submitted attesting to that self-employment.
- c. Where a specific degree is required for TN classification a combination of education and experience may not be used as a substitute for the specific degree.

9 FAM 41.59 N7.2 License Not Required

(CT:VISA-2168; 08-27-2014)

- a. The list of professions reveals requirements for admission into the United States under immigration provisions. Such requirements for admission or classification as a NAFTA professional do not include licensure. Licensure to practice a given profession in the United States is a post-entry requirement subject to enforcement by the appropriate state or other non-Federal authority.
- b. Proof of licensure to practice a given profession in the United States may be offered along with a job offer letter or other documentation in support of an application for TN classification. But admission/classification *must* not be denied based solely on the fact that the applicant does not already hold a license to practice in the United States.

9 FAM 41.59 N8 DENIAL OF TN STATUS IN CERTAIN LABOR DISPUTES

(CT:VISA-1346; 10-14-2009)

A citizen of Canada or Mexico may be denied TN status as described in section 214(e) and annex 1603 of the NAFTA if:

- (1) The Secretary of Labor certifies to, or otherwise informs the commissioner, that a strike or other labor dispute involving a work stoppage of workers in the alien's occupational classification is in progress at the place where the alien is, or intends to be, employed.
- (2) Temporary Entry of that alien may affect adversely either:
 - (a) The settlement of any labor dispute that is in progress at the place or intended place of employment; or
 - (b) The employment of any person who is involved in such dispute.

9 FAM 41.59 N8.1 If Employed Alien is Participating in Strike

(CT:VISA-1023; 09-15-2008)

If the alien has already commenced employment in the United States, and is participating in a strike or other labor dispute involving a work stoppage of workers, he and/or she is not considered to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers. This holds whether or not such strike or other labor dispute has been certified by the Secretary of Labor, or whether DHS has been otherwise informed that such a strike or labor dispute is in progress. The alien is subject to the following terms and conditions.

9 FAM 41.59 N8.2 Notification of Denial

(CT:VISA-2168; 08-27-2014)

If it is determined that an alien shall be denied a TN visa, or is denied entry to the United States, the applicant must be notified in writing of the reason(s) for the refusal. In addition, the Office of Legislation, Regulations, and Advisory Opinions (CA/VO/L/A) must be immediately informed of such denial, *if the denial is due to a labor dispute*, so that a designated representative of the applicant's home country government may be promptly notified in writing of the reason for the refusal.

9 FAM 41.59 N9 MAXIMUM PERIOD OF ADMISSION IN THE UNITED STATES

(CT:VISA-1879; 09-11-2012)

A Canadian or Mexican citizen seeking admission as a TN professional shall be treated as if seeking classification under INA 101(a)(15); therefore, the INA 214(b) presumption of immigrant intent applies if he fails to meet all the requirements of the TN visa category. The maximum period of each admission of a TN is three years. The admission period of a dependent (TD) shall coincide with the TN principal's. (See 9 FAM 41.59 N5 for definition of "temporary.") There is no statutory limitation on stay for those aliens in TN status such as there are for H1B or L1 visa holders.

9 FAM 41.59 N10 PART-TIME EMPLOYMENT

(CT:VISA-1879; 09-11-2012)

An alien entering the United States in TN status may be employed on a part-time basis.

9 FAM 41.59 N11 SELF-EMPLOYMENT

(CT:VISA-1879; 09-11-2012)

An alien may not qualify for a TN visa on the basis of self-employment.

9 FAM 41.59 N12 CHANGING OR ADDING EMPLOYERS OR STATUS

(CT:VISA-1543; 09-27-2010)

- a. Aliens in TN status may change or add employers while in the United States by filing Form I-129, Petition for a Nonimmigrant Worker, with the appropriate service center of the U.S. Citizenship and Immigration Service (USCIS) as designated on the application itself. A new application is unnecessary where the TN's jobsite is changed but the employer remains the same.
- b. A Canadian citizen wishing to change or add employers may also depart the United States and apply for readmission with DHS at the port-of-entry (POE).
- c. Any other extension or change of status may be filed directly with DHS by filing the Form I-129 directly to the appropriate service center of USCIS.

9 FAM 41.59 N13 SPOUSES AND MINOR CHILDREN (TD VISA HOLDERS)

(CT:VISA-1543; 09-27-2010)

- a. Spouses and minor, unmarried children who are accompanying or following-to-join TN professionals may be admitted to the United States in the TD classification. TD visa applicants, like TN visa applicants, are subject to INA 214(b). Dependents are not permitted to accept employment in the United States while in TD status unless they are otherwise authorized to do so by DHS. They are, however, permitted to attend school on a full-time basis. There is no processing fee for classifying dependents of Canadian TNs. As with any derivative status, TD applicants must demonstrate a bona fide spousal or parent-child relationship to a TN status holder.
- b. If the TN status holder is a Canadian who obtained TN status without the use of a visa, he or she should be able to show a valid Form I-94, Arrival and Departure Record, which demonstrates that DHS authorized his or her TN status. Aliens normally exempt from visa requirements need not obtain visas in order to support the dependent (TD) visa application.

9 FAM 41.59 N14 VALIDITY OF VISAS FOR TN FAMILY MEMBERS

9 FAM 41.59 N14.1 Mexican or Canadian Family Members

(CT:VISA-1346; 10-14-2009)

Family members possessing either Mexican or Canadian citizenship should be issued multiple entry visas valid for the maximum period authorized by reciprocity schedules or for the length of the principal alien's visa and/or authorized period of stay, whichever is less. (See reciprocity schedules for fees.)

9 FAM 41.59 N14.2 TN Family Members Not Possessing Mexican or Canadian Citizenship

(CT:VISA-2168; 08-27-2014)

Non-Canadian or non-Mexican family members of TN status holders are entitled to TD visas, which can be issued in non-Canadian or non-Mexican passports. However, only the Canadian and Mexican reciprocity schedules provide data for TN and TD visas. Therefore, the number of entries, fees, and validity for non-Canadian or non-Mexican family members of a TN status holder seeking TD visas *must* be based on the reciprocity schedule of the TN principal alien. For example, a Chinese national married to a Canadian would be issued a TD visa in his or her Chinese passport based on the Canadian reciprocity schedule. In this case the applicant would be the recipient of a visa valid for multiple entries, no

fee. However, a Mexican married to a Canadian would be issued a TD visa in his or her Mexican passport valid for multiple entries with a fee of \$100.00 based on the Mexican reciprocity schedule.

9 FAM 41.59 N14.3 *Domestic Employee of NAFTA Professional*

(CT:VISA-2168; 08-27-2014)

A domestic servant of a TN who meets the requirements set forth in 9 FAM 41.31 N7 may be issued a B-1 visa.

9 FAM 41.59 N14.4 *Canadians Requiring TN Visas*

(CT:VISA-1346; 10-14-2009)

In rare cases, posts may need to issue a TN visa to a Canadian. For example, a Canadian without TN status, who resides in a third country with a non-Canadian spouse or family members, and who plans to enter the United States as a NAFTA professional simultaneously with the family member(s) will need a TN visa in order to confer derivative (TD) status on his or her dependents. In such cases, the Canadian could not wait to have his or her case adjudicated by DHS at a port-of-entry (POE), since the non-Canadian dependent would require a visa to board a flight and to apply for entry into the United States.

9 FAM 41.59 N15 *NAFTA PROFESSIONALS NOT SUBJECT TO INA 212(E)*

(CT:VISA-2168; 08-27-2014)

The two-year home residency requirement for some former J-1 holders applies only to immigrant visa (IV) applicants, and to H and L nonimmigrant visa (NIV) applicants. Thus, TN applicants and their TD family members who are former exchange visitors subject to INA 212(e) are not prohibited from receiving visas and entering the United States as NAFTA professionals, even if their professional activities might be similar or identical to those of an H or L recipient.